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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Computer III Further Remand Proceedings: Bell
Operating Company Provision of Enhanced
Services

1998 Biennial Regulatory Review -- Review of
Computer III and ONA Safeguards and
Requirements

CC Docket No. 95-20

CC Docket No. 98-10

**Reply Comments of the
Information Technology Association of America**

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SUMMARY

A significant number of the commenting parties joined with ITAA to urge the Commission to preserve the pro-competitive regulatory regime applicable to information services.

Basic/Enhanced Dichotomy. A broad range of commenters agree with ITAA that the Telecommunications Act codified the Commission's basic/enhanced dichotomy. Of all the commenting parties, only two suggest that Congress intended to fundamentally alter this dichotomy. These parties argue that the statutory terms "telecommunications service" and "information service" overlap, and that the Commission should classify some previously unregulated services as telecommunications. In its recent Report to Congress on Universal Service, however, the Commission reaffirmed that Congress intended to preserve the regulatory dichotomy that the Commission established in Computer II. Neither party has advanced any argument that could justify repudiating this conclusion.

Protocol Conversion Services. As it did in the BOC Non-Accounting Safeguards Order, the Commission should reject U S West and Bell Atlantic's request to treat some forms of protocol conversion as regulated telecommunications services. Instead, the Commission should reaffirm that protocol conversion services fall squarely within the statutory definition of an information service. As the Commission has recognized repeatedly, the non-regulated status of protocol conversion has provided significant consumer benefits.

Access Charges. Bell Atlantic and U S West have made an untimely attempt to seek reconsideration of the Commission's decision, in the Access Charge Order, that ISPs should continue to be allowed to obtain local services under the same State tariffs as other business users. Bell Atlantic's claim that the ability of ISPs to purchase State-tariffed business lines

deters ISPs from purchasing "innovative telecommunications services" has no more merit today than it had when the Commission rejected it last year. Moreover, contrary to U S West's claim, the appearance of services that allow voice traffic to be carried over the Internet does not provide a basis for the wholesale imposition of carrier access charges on all ISPs.

Structural Separation. In its initial comments, ITAA demonstrated that the relevant question in this proceeding is not whether to "*reimpose*" structural separation; it is whether the BOCs can show that current regulatory and market conditions justify *eliminating* the structural separation requirement for BOC intra-LATA information services. Like ITAA, a significant number of the commenters believe that, while the appearance of Competitive Local Exchange Carriers is a positive development, local competition plainly has not reached a level sufficient to restrain anticompetitive conduct by the BOCs. At the same time, many of the commenters warned that the BOCs' aggressive entry into the information services market since the Ninth Circuit's decision in California III has increased their incentive to discriminate against non-affiliated ISPs. Many of the commenting parties therefore agree that the BOCs should be required to provide all information services through a separate affiliate.

Promoting Competitive Data Transport Services. Several of the commenters suggest that the Commission should grant ISPs the right to obtain local loops from ILECs and to collocate xDSL equipment in the ILECs' networks. While ITAA shares these commenters' goal of facilitating the deployment of broadband facilities, it does not believe that it is advisable or necessary to grant ISPs what, in effect, are "Section 251-like" rights.

First, the extension of Section "251-like rights" to ISPs inevitably will lead to calls for the imposition of common carrier obligations on ISPs. Further, given the carriers'

incentive to discriminate, ITAA is skeptical that any regulatory regime that requires an incumbent monopoly local exchange carrier to allow competitors to use elements of its network to provide service can be effective. Finally, in many cases, allowing ISPs to obtain loops simply would result in the deployment of a second line to be used solely in connection with the ISP's services. There is, however, not likely to be much demand for such a service. Rather, the local loop is best provided by incumbent or competitive LECs, which also can deploy xDSL or other high-speed data transport technology.

Rather than extending Section 251-like rights to ISPs, the Commission should modify the existing Expanded Interconnection rules to allow data-oriented Competitive Access Providers (D-CAPs) to obtain aggregated data traffic, at cost-based prices, from the ILECs at the serving central office. Because D-CAPS would not have to provide the local loop, they could enter the market easily and inexpensively. The Commission also should give ISPs the same rights as D-CAPs to obtain aggregate data traffic from ILECs for transport over the ISPs' packet networks.

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**Reply Comments of the
Information Technology Association of America**

The Information Technology Association of America ("ITAA") hereby replies to the comments submitted in response to the Commission's Further Notice of Proposed Rulemaking in the above-captioned proceeding.¹ As demonstrated below, a significant number of the commenting parties concurred with ITAA that the Commission should: (1) make clear that the Telecommunications Act codified the Commission's basic/enhanced dichotomy; (2) require the BOCs to provide all information services through a separate affiliate; and (3) take action to facilitate the availability of data-oriented features and functions by promoting the competitive deployment of local data transport services. The Commission also should reject the

¹ See Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review -- Review of Computer III and ONA Safeguards and Requirements, CC Docket Nos. 95-20, 98-10, FCC 98-8 (rel. Jan. 30, 1998) ("Notice").

untimely efforts of some of the commenting parties to seek reconsideration of the agency's decision not to extend carrier access charges to Information Service Providers ("ISPs").

I. THE COMMISSION SHOULD PRESERVE THE ESTABLISHED BOUNDARY BETWEEN REGULATED AND NON-REGULATED SERVICES

A. The Commission Should Make Clear that the Telecommunications Act Codified the Agency's Established Regulatory Dichotomy

In its initial comments, ITAA demonstrated that the Telecommunications Act of 1996 codified the Commission's basic/enhanced dichotomy.² A broad range of commenters -- including local exchange, interexchange, and information technology companies -- reached this same conclusion.³ Ameritech, for example, observed that "there is simply no basis to conclude that Congress intended a departure from the Commission's traditional usage of its basic/enhanced dichotomy."⁴

Of all the commenting parties, only two -- the Telecommunications Resellers Association ("TRA") and Conectiv Communications -- suggest that Congress intended the Telecommunications Act to fundamentally alter the Commission's basic/enhanced dichotomy.⁵

² See Comments of the Information Technology Association of America at 4-6 ("ITAA Comments").

³ See Comments of Ameritech 14-15 ("Ameritech Comments"); Comments of AT&T at 7-9 ("AT&T Comments"); Comments of America Online, Inc. at 5-7 ("AOL Comments"); Comments of CompuServe Network Services at 13 ("CompuServe Comments"); Comments of Metro One Telecommunications, Inc. at 8.

⁴ Ameritech Comments at 15.

⁵ See Comments of the Telecommunications Resellers Association at 9 ("TRA Comments"); Comments of Conectiv Communications, Inc. at 2 ("Conectiv Comments").

These parties argue that the statutory terms "telecommunications service" and "information service" overlap.⁶ Based on their broad reading of these terms, TRA and Conectiv further argue that the Commission should classify some previously unregulated services as "telecommunications services." The Commission should decline this invitation.

The Commission has addressed this issue in two recent proceedings. In its recent Report to Congress on Universal Service, the Commission reaffirmed that "Congress intended the categories of 'telecommunications service' and 'information service' to be mutually exclusive."⁷ And, in the BOC Non-Accounting Safeguards Order, the Commission determined that Congress intended "all services the Commission has previously considered to be 'enhanced'" to be included in "the statutory term 'information service.'"⁸ Neither TRA nor Conectiv has advanced any argument that could justify the Commission repudiating these conclusions. Consistent with these findings, only those services previously considered to be "basic" can be included within the term "telecommunications services."

B. The Commission, Once Again, Should Reject BOC Efforts to Reclassify Protocol Conversion as a Regulated Service

Bell Atlantic and U S West have chosen to use this proceeding to make yet another attempt to get the Commission to impose common carrier regulation on protocol

⁶ See TRA Comments at 5; Conectiv Comments at 2.

⁷ Federal-State Joint Board on Universal Service, FCC 98-67, CC Docket No. 96-45, at ¶ 13 (rel. Apr. 10, 1998); see also Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, 11 FCC Rcd 21905, 21956 (1996) ("BOC Non-Accounting Safeguards Order").

⁸ BOC Non-Accounting Safeguards Order, 11 FCC Rcd at 21955-56 (emphasis added).

conversion services.⁹ As it has done repeatedly in the past, the Commission should reject the arguments recycled by these carriers.

Bell Atlantic asserts that, under the Telecommunications Act, the regulatory treatment of protocol conversion should turn on whether a specific application results in "a change to the form or content of the information that a user generates."¹⁰ Only those protocol processing services that entail a change in "information content" generated by an end-user, the carrier contends, are information services. By contrast, Bell Atlantic claims that services that act on the "envelope" surrounding user-generated information fall outside the definition of the term information services and should be regulated as telecommunications services.¹¹

The Commission thoroughly considered and flatly rejected this same argument in the BOC Non-Accounting Safeguards proceeding. The agency explained: "[w]e reject Bell Atlantic's argument that information services only refers to services that transform or process the content of information transmitted by an end-user . . . [t]he statutory definition makes no reference to the term 'content,' but requires only that an information service transform or process 'information.'"¹² Accordingly, the Commission confirmed that protocol processing services -- including those that "interpret and react to protocol information associated with the

⁹ See Comments of Bell Atlantic at 19 ("Bell Atlantic Comments"); Comments of U S West, Inc. at 16-18 ("U S West Comments").

¹⁰ Bell Atlantic Comments at 19.

¹¹ Id.

¹² BOC Non-Accounting Safeguards Order, 11 FCC Rcd at 21956.

transmission of end-user content" -- fall squarely within the statutory definition of an information service.¹³

The Commission also should reject U S West's claim that changed circumstances justify allowing the BOCs to provide protocol processing services as part of their regulated transmission service offerings.¹⁴ As a threshold matter, U S West's policy argument simply cannot defeat the plain language of the Telecommunications Act. Protocol conversion services fall squarely within the definition of an information service. Moreover, the policy arguments advanced by U S West for extending regulation to protocol processing services are entirely unpersuasive.

U S West asserts that, in the Computer III Phase II Order, the Commission classified protocol conversion as a non-regulated enhanced service in order to preempt State regulation of some value-added network providers.¹⁵ U S West further implies that because the Ninth Circuit determined (in California I) that the Commission could not preclude State regulation of an intrastate service by deregulating that service at the interstate level, there is no justification for the Commission's decision.¹⁶ This argument is without merit.

In the Computer III Phase II Order, the Commission determined that protocol conversion services should be provided on a non-regulated basis because "deregulated competition benefits consumers of telecommunications services by producing a greater variety

¹³ Id.

¹⁴ U S West Comments at 17.

¹⁵ Id.

¹⁶ Id.

of services at lower costs than are generally available under conditions of . . . traditional regulation."¹⁷ The Commission recently affirmed that the policy rationale for treating protocol conversion as a non-regulated offering remains valid.¹⁸ The fact that the Commission may not be able to preempt all State efforts to regulate carrier-provided protocol conversion does not change this. To the contrary, it makes it all the more important for the Commission to lead by example -- by preserving the non-regulated status of protocol conversion at the Federal level.

The Commission, moreover, has recognized that extending common carrier regulation to protocol processing services would be inconsistent with "Congress's deregulatory intent in enacting the 1996 Act."¹⁹ Contrary to U S West's belief, classification of protocol processing services also could result in the regulation of some information service providers.²⁰ This result would plainly be inconsistent with the established congressional policy that "the Internet and other interactive computer services" should remain "unfettered by Federal or State regulation."²¹

¹⁷ Amendments of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry, 2 FCC Rcd 3072, 3080 (1987) (subsequent history omitted).

¹⁸ The Commission explained that extending Title II regulation to protocol conversion services is unnecessary "[b]ecause the market for protocol processing services is highly competitive," and undesirable because it "would likely result in a significant burden to small independent ISPs that provide protocol processing services." BOC Non-Accounting Safeguards Order 11 FCC Rcd at 21957; see Independent Data Communications Manufacturers Association Petition for Declaratory Ruling that AT&T's InterSpan Frame Relay Service Is a Basic Service, 10 FCC Rcd 13717, 13719 (1995).

¹⁹ BOC Non-Accounting Safeguards Order, 11 FCC Rcd at 21957.

²⁰ See U S West Comments at 17.

²¹ 47 U.S.C. § 230(b).

C. The Commission Should Affirm That, Under Section 202, a Facilities-based Carrier That Provides an Information Service Must Unbundle the Underlying Telecommunications Service

The United States Telephone Association ("USTA") has fundamentally mischaracterized a critical portion of the Notice. The Notice inquires whether "the Commission's Computer II decision should now be interpreted to require facilities-based common carriers that provide information services to unbundle their telecommunications services and offer such services to other ISPs under the same tariffed terms and conditions under which they provide such services to their own information services operations."²² USTA asserts that this question indicates that "the Commission is contemplating increasing regulatory burdens on ILECS."²³ This is plainly incorrect.

Since Computer II, the Commission has repeatedly recognized that, pursuant to Section 202 of the Communications Act, any facilities-based carrier that provides enhanced services must unbundle the transmission capacity underlying its enhanced services and make that capacity available to competing enhanced service providers on a non-discriminatory basis.²⁴ In the Notice, the Commission has merely proposed to conform the terminology used to describe this non-discrimination principle to that used in the Telecommunications Act by substituting the terms "telecommunications" and "information" service for the terms "basic" and "enhanced"

²² Notice ¶ 42.

²³ Comments of the United States Telephone Association at 2 ("USTA Comments").

²⁴ See Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), Final Decision, 77 F.C.C.2d 384, 475 (1980)(subsequent history omitted); Independent Data Communications Manufacturers Association Petition for Declaratory Ruling that AT&T's InterSpan Frame Relay Service Is a Basic Service, 10 FCC Rcd 13717, 13719 (1995); Competition in the Interstate Interexchange Marketplace, 10 FCC Rcd 4562, 4580 (1995).

service. This simple change in nomenclature plainly does not represent a substantive change in the unbundling obligations imposed on carriers that provide information services using their own common carrier transmission facilities. The Commission therefore should adopt its proposal.

II. THE COMMISSION SHOULD REJECT BELL ATLANTIC AND U S WEST'S UNTIMELY EFFORTS TO SEEK RECONSIDERATION OF THE COMMISSION'S DECISION NOT TO EXTEND CARRIER ACCESS CHARGES TO ISPs

In the Access Charge proceeding, the BOCs had ample opportunity to present their views on the access charge treatment of ISPs. The carriers took full advantage of this opportunity, submitting voluminous pleadings and other materials in support of their crusade to extend carrier access charges to ISPs. Despite their extensive efforts, the Commission found the BOCs arguments to be unpersuasive.²⁵ Not satisfied with this result, the carriers have renewed their campaign in this proceeding.

The Commission should summarily reject Bell Atlantic and U S West's untimely attempt to use this proceeding as a vehicle to seek reconsideration of the Access Charge Order. The Commission has consistently held that ISPs are users of telecommunications services, rather than common carriers. As a result, ISPs have always been allowed to obtain local telecommunications services under the same State tariffs available to other business users.²⁶

²⁵ See Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing; End User Common Line Charges, 12 FCC Rcd 15982, 16133-35 (1997), appeal pending sub nom. Southwestern Bell Tel. Co. v. FCC, No. 97-2618 (8th Cir.).

²⁶ See Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, 3 FCC Rcd 2631 (1988); MTS and WATS Market Structure, 97 F.C.C.2d 682, 711-12 (1983).

Permitting ISPs to do so, the Commission affirmed in its recent Report to Congress, "comports with the plain language of the 1996 Act and with the public interest."²⁷

Bell Atlantic and U S West have raised no new arguments that warrant revisiting the Commission's decision. For its part, Bell Atlantic claims that the ability of ISPs to purchase State-tariffed business lines deters ISPs from purchasing "innovative telecommunications services."²⁸ This argument has no more merit today than it had when the Commission rejected it last year. Unlike the BOCs, ISPs operate in a highly competitive market. ISPs therefore have a strong economic incentive to provide their customers with the most efficient service. For this reason, ISPs would be likely to purchase high speed data transport services offered by the ILECs -- or any other provider -- that are widely deployed and priced at reasonable levels. There is no need for the Commission to artificially create demand for BOC-provided "innovative telecommunications services" by depriving ISPs of their ability to purchase State-tariffed business lines.

Contrary to U S West's claim, the existence of "IP telephony" services does not provide a justification for imposing carrier access charges on ISPs.²⁹ The term IP telephony refers to a wide range of services -- from software that allows users to exchange one-way voice messages between computers connected to the Internet, to services that permit telephone-to-telephone communications that originate and terminate on the public switched network.³⁰ In

²⁷ Federal-State Joint Board on Universal Service, Report to Congress, FCC 98-67, CC Docket No. 96-45, ¶ 147 (rel. Apr. 10, 1998) ("Universal Service Report to Congress").

²⁸ Bell Atlantic Comments at 17.

²⁹ See U S West Comments at 19.

³⁰ See Universal Service Report to Congress ¶¶ 84-89.

its Report to Congress, the Commission determined that certain variants of IP telephony services may meet the statutory definition of the term telecommunications service. As a result, the Commission concluded that it may be appropriate to impose certain forms of common carrier regulation -- possibly including carrier access changes -- on these providers. The Commission further recognized, however, that such determinations are best made on a case-by-case basis.³¹ Whatever the merits of imposing carrier access charges on those IP telephony services that "bear the characteristics of telecommunications" may be, the Commission should keep in mind many other variants of IP telephony plainly do not constitute telecommunications.

III. THE COMMISSION SHOULD PRESERVE THE REQUIREMENT THAT THE BOCs PROVIDE ALL INFORMATION SERVICES THROUGH A SEPARATE AFFILIATE

In its initial comments, ITAA demonstrated that the effect of the Ninth Circuit's decision in California III was to return the Commission to the Computer II structural separation regime.³² Consequently, the relevant question in this proceeding is not whether structural separation should be "reimposed." Rather, it is whether the BOCs can show that current

³¹ Id. at ¶ 91.

³² See ITAA Comments at 9-10. The only other party to address this issue, MCI, concurs with ITAA. See Comments of MCI Telecommunications Corporation at 17-22 ("MCI Comments"). As explained in MCI's comments, the court in California III vacated the Commission's decision in the Computer III Remand Order to replace the structural safeguards of Computer II with nonstructural safeguards. As a result, "the proper starting point for . . . analysis in this proceeding is complete structural separation under the prior Computer II rules." Id. at 19. According to MCI, "[i]f the Commission . . . incorrectly assum[es] that the starting point is structural integration under CEI Plans . . . any structural relief granted at the conclusion of this docket is virtually certain to be reversed." Id.

regulatory and market conditions justify eliminating the structural separation requirement for BOC intra-LATA information services.

A significant number of the commenting parties believe that current conditions do not justify lifting structural separation. Many of the non-ILEC commenters -- including end-users, interexchange carriers, and information technology companies and end-users -- agree that the BOCs retain the ability and incentive to discriminate against non-affiliated ISPs by virtue of their "dual role" as a "provider of enhanced services" and as a provider of the "facilities that independent firms need to offer services to their own customers."³³

As demonstrated in the comments, despite the pro-competitive provisions of the Telecommunications Act, the BOCs still are not subject to effective competition. As evidence of the BOCs market power, AT&T, MCI and AOL cite the fact that the BOCs still account for 99.1 percent of all local service revenues in their regions.³⁴ Thus, as the Ad Hoc Telecommunications Users Committee observed, "while limited competition is emerging in the local exchange and interstate access markets, it has hardly reached a level sufficient to restrain anticompetitive conduct by the BOCs."³⁵

³³ Comments of the General Services Administration at 6; see Comments of the Ad Hoc Telecommunications Users Committee at 3-5 ("Ad Hoc Comments"); AT&T Comments at 10; MCI Comments at 4, 5; Comments of LCI International Telecom Corp. at 5-7 ("LCI Comments"); AOL Comments at 9-11; Comments of Community Internet Systems at 2 ("CIS Comments"); CompuServe Comments at 6; Comments of the Commercial Internet Exchange Association at 4, 5 ("CIX Comments"); Comments of Helicon Online, L.P. at 3-5 ("Helicon Comments").

³⁴ See AT&T Comments at 10; MCI Comments at 5; AOL Comments at 9.

³⁵ Ad Hoc Comments at 3; see LCI Comments at 6, 7.

The commenters also cautioned that the BOCs' incentive to discriminate has, if anything, increased since the Ninth Circuit's decision in California III.³⁶ As explained by CIX, "[a]t the time of the Computer III and California III decisions, the RBOC 'enhanced' or 'information' services primarily entailed the provision of voicemail service and other telephony-oriented enhancements. Today, however, the RBOCs have aggressively moved into a broader range of information services, and especially Internet services."³⁷ The BOCs incentive to discriminate against non-affiliated ISPs will further increase as they gain entry into the in-region inter-LATA information services market.

Many of the commenting parties also agree that "requiring the BOCs to provide all information services through a structurally separate affiliate will be the most effective way to prevent anticompetitive conduct and serve the public interest."³⁸ In addition to being effective in deterring access discrimination, structural separation is administratively efficient. As CompuServe explained, structural separation "helps protect BOC competitors and customers with a minimum of Commission involvement because it does not require that the Commission actively and regularly monitor the BOCs' information service subsidiaries."³⁹

At the same time, many of the commenters concur that "the marginal costs" of requiring the BOCs to provide all their information services through a structurally separate

³⁶ See ITAA Comments at 12; MCI Comments at 54; CIX Comments at 6.

³⁷ CIX Comments at 6. The BOCs circumvent the provision of statutory inter-Lata services by "teaming" with inter-LATA carriers.

³⁸ See, e.g., AOL Comment at 12; see GSA Comments at 5, 6; CompuServe Comments at 8, 9; LCI Comments at 10; MCI Comments at 6.

³⁹ CompuServe Comments at 9; see AOL Comments at 13; ITAA Comments at 14.

affiliate will be "minimal."⁴⁰ As explained by MCI, "Once a BOC sets up a separate affiliate to offer its interLATA information services under Section 272 of the Communications Act, there will be little additional cost in offering all remaining information services through the same affiliate, thereby removing the main cost of separation previously cited by the BOCs."⁴¹

IV. THE COMMISSION SHOULD TAKE ADDITIONAL ACTION TO PROMOTE THE AVAILABILITY OF THE TELECOMMUNICATIONS SERVICES THAT ISPs REQUIRE

In the Notice, the Commission asked whether the entry of competitive local exchange carriers ("CLECs") is sufficient to prevent ILECs from discriminating against ISPs, or whether the Commission should grant ISPs Section 251-like rights to purchase unbundled network elements. ITAA supports efforts to promote the entry of CLECs. Like many of the other commenters, however, ITAA is concerned that these carriers will serve only niche markets for the foreseeable future.⁴² As Time Warner and several other commenters explained, BOC anticompetitive conduct -- particularly in the provision of unbundled network elements and collocation, and in withholding reciprocal compensation payments owed to CLECs serving

⁴⁰ LCI Comments at 8; see AOL Comments at 8; CIX Comments at 14.

⁴¹ MCI Comments at 8. Contrary to BellSouth's apparent assumption, the Commission cannot eliminate all structural separation at this time in order to provide the BOCs "the same opportunity as any other LEC to structure their enhanced services" operations in the manner they see fit. BellSouth Comments at 5. In the Telecommunications Act, Congress recognized that BOC anticompetitive conduct poses a particular risk to competition in the information services market. Accordingly, the BOCs are "required by Congress to establish a separate affiliate for interLATA information services" pursuant to Section 272 of the Communications Act. CompuServe Comments at 10.

⁴² See Comments of Time Warner Communications Holdings, Inc. at 5, 6 ("Time Warner Comments"); Helicon Comments at 3, 4; LCI Comments at 7; CIS Comments at 11, 12; AOL Comments at 9; Joint Comments of APK Net, Ltd. *et al.* at 11 ("Joint Comments").

ISPs -- has "diminished substantially the CLECs' incentive and ability to serve ISPs."⁴³ Consequently, ISPs "remain overwhelmingly dependent on incumbent carriers such as the BOCs for local access to their customers."⁴⁴

While the commenting parties generally agree that the entry of CLECs, by itself, is not sufficient to prevent BOC discrimination, they advocate different approaches to promote the availability of the high-bandwidth telecommunications services that ISPs require. Common to many of these approaches is the belief that the Commission should grant ISPs the right to obtain local loops from ILECs and to collocate xDSL equipment in the ILECs' networks.⁴⁵ ITAA shares these commenters' goal of facilitating the deployment of broadband facilities. At the same time, however, ITAA does not believe that it is advisable or necessary to grant ISPs what, in effect, are "Section 251-like" rights.

As an initial matter, the extension of "Section 251-like rights" to ISPs will inevitably lead to calls for the imposition of common carrier obligations on ISPs. Indeed, several commenters propose exactly that.⁴⁶ Moreover, given the carriers' strong incentive to discriminate, ITAA is skeptical that any regulatory regime that requires an incumbent monopoly local exchange carrier to allow competitors to use elements of its network to provide service can

⁴³ Time Warner Comments at 6; see CIX Comments at 11; LCI Comments at 7; CIS Comments at 2; Comments of Metro One Telecommunications at 4.

⁴⁴ AOL Comments at 9, 10.

⁴⁵ See Joint Comments at 13-18; CIX Comments at 8-12; Helicon Comments at 7; CIS Comments at 2; AOL Comments at 16.

⁴⁶ See Comments of the People of the State of California and the Public Utilities Commission of the State of California at 2-7; Comments of NorthPoint Communications, Inc. at 4-5.

be effective. ONA, for example, utterly failed "as a means to help ISPs obtain the basic services they require to provide information services."⁴⁷ Indeed, the carriers were able to transform this program from a vehicle for "fundamental unbundling" of the local network into a meaningless regulatory exercise. As a result, ISPs have relied on state-tariffed business lines rather than ONA services. More recent experience with the local competition provisions of Section 251 of the Telecommunications Act further demonstrates the ability of incumbent LECs to use their dual role as a provider of an essential input and a competitor in the market using that input to leverage control of their monopoly networks to frustrate the development of competition.⁴⁸

Finally, ITAA believes that allowing ISPs to provide the transport link between their subscribers and the local central office may not be the most efficient approach. In many cases, allowing ISPs to obtain loops simply would result in deployment of a second line that would be used solely in connection with the ISPs' services. There is not likely to be significant customer demand for such a service. Rather, most customers seek to obtain both voice and data services over the same loop. Consequently, these facilities are best provided by ILECs and CLECs, which can then deploy xDSL or other high-speed data transport technologies.

ITAA believes that the most effective way to prevent BOC anticompetitive conduct -- and to facilitate the widespread availability of new, innovative, and reasonably-priced

⁴⁷ AOL Comments at 14; see ITAA Comments at 20-23; Helicon Comments at 6; Ad Hoc Comments at 9.

⁴⁸ See LCI Comments at 7; CIX Comments at 11; Helicon Comments at 3; CIS Comments at 2.

data services -- is to promote competition among multiple services and service providers. To facilitate such competition, ITAA proposed in its initial comments that the commission:

- Preserve ISPs' right to purchase State-tariffed circuit switched business lines from the incumbent LECs on the same terms as other large business users.
- Ensure that ILECs provide xDSL transport service to the ILEC's information services affiliate, and to non-affiliated ISPs, on a non-discriminatory basis.
- Facilitate entry by Competitive Local Exchange Carriers.
- Modify the existing Expanded Interconnection rules to allow Data-oriented Competitive Access Providers (D-CAPs) to obtain aggregated data traffic, at cost-based prices, from the ILECs at the serving central office.
- Modify the Expanded Interconnection rules to give ISPs the same rights as D-CAPs to obtain aggregate data traffic from ILECs for transport over the ISPs' packet networks.

By requiring ILECs to provide xDSL transport on a non-discriminatory basis, and promoting additional forms of competition, the Commission will reduce the opportunities of incumbent LECs to discriminate, while spurring the deployment of the facilities and services necessary to meet the needs of ISPs. For example, by making modest changes in existing rules, the Commission can facilitate the entry of data-oriented Competitive Access Providers, which could aggregate xDSL-based data traffic at the ILECs' central offices and carry it to ISPs' networks. Because D-CAPs would not provide loop-based xDSL service to end-users, they could avoid the significant costs and other problems that data CLECs have encountered in their efforts to obtain unbundled local loops from ILECs. The lower costs of entry, in turn, would make it more likely that companies will offer local data transport services, thereby providing ISPs with a competitive alternative to ILEC-provided service.


CONCLUSION

For the foregoing reasons, the Commission should: (1) confirm that the Telecommunications Act codified the existing dichotomy between regulated and non-regulated services; (2) reject BOC efforts to seek reconsideration of the agency's decision not to extend carrier access charges to ISPs; (3) preserve the requirement that the BOCs to provide all information services through a separate affiliate that complies with the requirements of Section 272; and (4) modify its rules to promote competitive deployment of local data transport services by Incumbent Local Exchange Carriers, Competitive Local Exchange Carriers, Competitive Access Providers, and ISPs themselves.

Respectfully submitted.

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